STATE OF MICHIGAN

COURT OF APPEALS

In re Elliott/Massie, Minors.

UNPUBLISHED
March 24, 2015

No. 322742
Monroe Circuit Court
Family Division
LC No. 14-023202-NA

Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Respondent appeals by leave granted an adjudication order reflecting a jury verdict that the court had jurisdiction over respondent's two minor children. We affirm.

Respondent first argues that the trial court erred in allowing her seven-year-old child to testify as a witness without being subject to an oath, affirmation or promise that he would testify truthfully. Respondent failed to object, waiving his right to assert error on appeal. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981). However, even if we were to entertain this issue, we would find no cause for reversal.

MRE 603 provides that, "(b)efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." CJI 2d 5.9 indicates that a young child's testimony may be presented on a promise to tell the truth rather than on an oath or affirmation. There is no indication in the record that the child expressly made an oath, affirmation or promise. However, before testifying he was read a book on the record that included a series of test questions, which he answered correctly, that were clearly designed to awaken the young child's conscience and impress upon him the duty to tell the truth. The court noted: "[Y]ou seem to be very good at telling the difference between what's true and what's a lie." Therefore, contrary to respondent's assertion, the court made a determination on the record that the child understood the difference between telling the truth and telling a lie, and was competent to testify. Moreover, at the conclusion of his testimony the court reaffirmed that the child understood the obligation to testify truthfully. The court asked: "So what you told us is not a made up story but it's really the truth?" He responded "Yes". Thus, the trial court properly determined that the child was competent to testify and was mindful of the duty to testify truthfully. Had respondent objected to the lack of an express promise, there is every indication that one would have been forthcoming.

Next, respondent asserts that the trial court erred in relying on a pretrial order in allowing the child to testify while granting petitioner's motion for a protective order to allow the child to testify in chambers via closed circuit television even though the motion was not timely. A trial court's granting or denying of a motion to admit evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). The decision whether to enforce a scheduling order is reviewed for an abuse of discretion. See *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997).

Respondent notes that petitioner's previous counsel and the lawyer-guardian ad litem had advised that the child would not be called as a witness and that two days before trial petitioner's newly assigned counsel informed respondent's counsel that he would be called as a witness. The trial court did not abuse its discretion in allowing the child to testify because respondent was put on notice that he was a possible witness by petitioner's witness list and respondent cannot claim an unfair disadvantage or surprise. The child's statements were specific and essential allegations in the petition.

In arguing that the trial court abused its discretion by allowing the child to testify via closed circuit television, respondent relies heavily on the April 8, 2014 pre-trial scheduling order that imposed a motion deadline of May 6, 2014. Respondent notes that petitioner brought its motion at the beginning of the June 20, 2014 adjudication trial. Respondent emphasizes that petitioner's motion ran counter to the instructions in the court's scheduling order and that there was no reason for the court to make an exception to its scheduling order under the premise that a new attorney had just taken over the file. The record shows that the trial court properly weighed possible risks to the young child if he was required to testify in his mother's presence. The trial court ordered that he would testify in chambers because of his tender age and the difficulty in providing testimony against the mother. The court astutely noted, ". . . the objective of this case is to reunify the family and the Court doesn't want to do something that would jeopardize that reunification or make it harder for this child to go home." Moreover, the court heard and considered testimony from the case worker, who had training and experience in child welfare matters, including a master's degree in Family Life Education, that it would be psychologically or emotionally harmful for the child to testify in his mother's presence. The caseworker also opined that the child would be more willing to speak freely if respondent were not present.

Respondent was not unfairly disadvantaged by having her child testify in chambers. Respondent exercised her right to cross-examine the child, and the jury was able to observe the child's demeanor and assess his credibility. Therefore, it was not outside of the range of principled outcomes that the trial court allowed the child to testify out of respondent's and the jury's immediate presence via closed circuit television.

Finally, respondent claims that the jury's conclusion that one or more of the statutory grounds alleged in the petition had been proven was against the great weight of the evidence. This claim is meritless. The jury's statutory grounds findings are reviewed for clear error. To be clearly erroneous, a finding must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Clear error

exists "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

For the trial court to acquire jurisdiction over a child in a child protective proceeding, one or more statutory grounds alleged in the petition must be proven by a preponderance of the evidence. MCR 3.972; M Civ JI 97.35. "Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that the statutory ground is not true." M Civ JI 97.37.

MCL 712A.2(b)(1) provides in pertinent part:

> The court has the following authority and jurisdiction:
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> * * *
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

The proofs showed by a preponderance of the evidence that respondent was unable to provide proper or necessary support for her children or that respondent's home was an unfit place for them to live by reason of neglect, criminality or depravity.

Respondent has a significant prior history with Children Protective Services. It was undisputed that she was heavily addicted to heroin which led to the first removal of her children in August 2009. She was incarcerated on September 27, 2009, and provided with services in 2011 after her release. Services included a psychological evaluation, individual therapy, drug screens, parenting classes, substance abuse counseling, employment and education training. Respondent completed services and her children were returned to her on March 5, 2012, and the case was closed. Afterwards, she did not participate in any support services.

In October 2013, a new case was opened following a complaint that respondent was abusing heroin and stealing to support her drug habit. At the end of November 2013, respondent reportedly stopped using heroin but admitted to using marijuana. She was

again provided with services, including random drug screens that were negative. Shortly after that case closed in mid-March 2014, a complaint was received indicating that respondent's young children were smoking marijuana. During a forensic interview, respondent's son disclosed in very specific detail how he had smoked marijuana in respondent's presence. He also stated that his five-year-old brother had also tried marijuana. The children were again removed from respondent's custody and petitioner filed a protective proceedings petition on March 28, 2014. The primary concerns in the petition were respondent's apparent mental instability and her admitted drug use, along with her son's allegations. At the adjudication hearing, respondent's son provided credible testimony that he had smoked marijuana in respondent's presence. He described smoking "weed" with his mother, noting that the "weed" was placed in a glass pipe and lit with a lighter and was sometimes in paper, like a cigarette. He said that he had to suck in and blow out and that he did not like it because it made him cough. Respondent allegedly offered him the "weed" when he felt sad. The jury also heard respondent testify that she not only used marijuana but considered it to be a "holy plant" and a "spiritual sacrament." She stated that she would continue to use marijuana even though she admitted that it was wrong in the eyes of the law. Although she denied ever smoking in front of the children or giving them marijuana, respondent stated: ". . . I can't make an assessment based on whether or not I think that the plant would be bad for the children because I don't think that they found any evidence that it would be bad for the children."

In addition to the evidence that respondent's home was unfit for the children due to the exposure to substances, there was a preponderance of the evidence that respondent was unable to adequately provide for the children because of financial instability. Respondent testified that she had been unemployed since June 2012 because of medical issues. She had been financially dependent on her fiancé until the relationship ended on March 28, 2014, at which point respondent had no income to support herself and her children. Her rent was overdue and she had received an electricity shut-off notice. Water to the house had been shut off due to nonpayment. Respondent was without a clear plan of how she would provide for her children. Accordingly, there was no clear error in the jury's determination that a statutory ground was established.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Peter D. O'Connell